

Message Text

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E.O. 11652: N/A
TAGS: EINV, EC
SUBJECT: OPIC DISCUSSIONS WITH GOE

1. SUMMARY: OPIC COUNSEL LOREN WEISENFELD HELD DISCUSSIONS IN QUITO WITH GOE OFFICIALS MARCH 27-29 RE OPIC'S PROPOSALS FOR (A) POLITICAL RISK INSURANCE FOR CONSTRUCTION CONTRACTORS, (B) APPOINTMENT OF "FIDUCIARY AGENT" AS DEVISE TO MEET DECISION 24'S PROHIBITION OF DIRECT SUBROGATION RIGHTS TO OPIC, AND (C) GRANTING ARBITRATION RIGHTS TO OPIC IN A MANNER CONSISTENT WITH STRICTURES OF DECISION 24. FOREIGN MINISTRY'S LAWYERS RAISED SEVERAL PETTIFOGGING OBJECTIONS RE (A) AND (B) WHICH WEISENFELD COUNTERED WITH SOUND REFUTATIONS; BUT LAWYERS STOPPED SHORT OF CONCEDED HIS POINTS, AND SAID ONLY THEY WILL CONSIDER THEM FURTHER AND LET US KNOW DECISION SOON. RE (C), FOREIGN MINISTRY LAWYERS STOOD ADAMANTLY AGAINST ARBITRATION. IN SUBSEQUENT MEETINGS WITH MINISTER OF INDUSTRIES, COMMERCE AND INTEGRATION, MINISTER REAFFIRMED HIS STRONG DESIRE TO HAVE OPIC RE-ENTER ECUADOR, AND PROMISED TO PRESS FOREIGN MINISTRY TO COME AROUND RE (A) AND (B), BUT OFFERED NO HOPE RE (C). END SUMMARY.

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2. WEISENFELD ACCOMPANIED BY EMBASSY E/C COUNSELOR MET MARCH 27 AND 28 WITH GOE WORKING GROUP COMPOSED OF HEAD LAWYER AND ASSISTANT LAWYER FOR FOREIGN MINISTRY; DIRECTOR OF INVESTMENT AFFAIRS, MINISTRY OF INDUSTRIES, COMMERCE AND INTEGRATION (MICEI); REPRESENTATIVE OF CENDES (INDUSTRIAL DEVELOPMENT CENTER, AFFILIATE OF

MICEI); AND THE MINISTER/COUNSELOR FOR COMMERCIAL AFFAIRS OF THE ECUADOREAN EMBASSY IN WASHINGTON, HERNAN ORELLANA (WHO WAS VISITING QUITO AT THE TIME). SESSIONS TOTALLED OVER FIVE HOURS.

3. RE CONSTRUCTION CONTRACTORS, WEISENFELD RECALLED THAT IN HIM MEETINGS IN QUITO LAST NOVEMBER HE FOUND FAVORABLE ATTITUDE TOWARD OPIC'S VIEW THAT CONSTRUCTION ACTIVITIES DO NOT CONSTITUTE INVESTMENT AS DEFINED IN DECISION 24, AND THAT JUNTA IN LIMA HAS INFORMALLY CONCURRED IN THIS VIEW. FOREIGN MINISTRY LAWYERS, HOWEVER, EXPRESSED VAGUELY ARTICULATED CONCERNS THAT INSURANCE FOR SUCH CONTRACTORS MIGHT SOMEHOW VIOLATE DECISION 24. WEISENFELD PROVIDED EXHAUSTIVE ACCOUNT OF LEGAL BACKGROUND AND OF RELEVANT CASE HISTORY IN OTHER COUNTRIES, IN THE COURSE OF WHICH HE ABLY REFUTED THE POINTS RAISED BY THE LAWYERS. HOWEVER, THEY DID NOT EXPLICITLY CONCEDE THE VALIDITY OF HIS REFUTATIONS, AND SAID ONLY THEY WILL STUDY THE MATTER FURTHER AND REPORT THEIR DECISION PROMPTLY TO THE E/C COUNSELOR.

4. WEISENFELD WAS ASKED TO REPORT THE SUBSTANCE OF HIS DISCUSSIONS DURING THE PAST YEAR WITH LEGAL OFFICIALS OF THE JUNTA IN LIMA. WEISENFELD'S PRESENTATION FOCUSED ON QUESTIONS OF SUBROGATION AND ARBITRATION. REGARDING SUBROGATION, HE DESCRIBED THE FIDUCIARY-AGENT CONCEPT, AND EXPLAINED THAT OPIC WOULD CONTRACT WITH A LEGAL LIMITED OFFICIAL USE

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REPRESENTATIVE (WHO COULD BE A BANK, INSURANCE COMPANY, OR LAWYER) TO PRESENT ITS CLAIMS TO APPROPRIATE ECUADOREAN ADMINISTRATIVE AND JUDICIAL ORGANS. THE AGENT WOULD BE BOUND TO OPIC BY CONTRACT UNDER FIDUCIARY PRINCIPLES WELL ESTABLISHED IN ECUADOREAN LAW. WEISENFELD STRESSED THAT THE JUNTA IN LIMA HAS INFORMALLY ADVISED THAT THIS WOULD BE ACCEPTABLE IN PRINCIPLE IN THE ANDEAN REGION GENERALLY. THE FOREIGN MINISTRY LAWYERS SAID IT SEEMED TO THEM THIS DEVICE IS MERELY A "SHAM" WHICH DOES NOT ADEQUATELY REMOVE OPIC FROM SUBROGATION. WEISENFELD COUNTERED THAT THE FIDUCIARY AGENT WOULD BE ENTIRELY BOUND BY ECUADOREAN JURISDICTION, WHEREAS, IN THE ABSENCE OF THIS DEVICE, OPIC'S SUBROGATION CLAIMS WOULD BE PRESSED BY THE U.S. EMBASSY WHICH WOULD BE ACTING UNDER PRECEPTS OF INTERNATIONAL RATHER THAN ECUADOREAN LAW. AGAIN, HOWEVER, THE LAWYERS STOPPED SHORT OF ACCEPTING THE CONCEPT, AND SAID ONLY THEY WOULD STUDY IT FURTHER AND LET US KNOW.

5. REGARDING ARBITRATION, WEISENFELD SUMMARIZED OPIC'S MOST RECENT PROPOSALS, BUT THE LAWYERS POINTED TO PROVISIONS IN ECUADOREAN LAW AS WELL AS

TO PROHIBITIONS IN DECISION 24 AGAINST THE WITHDRAWAL OF A DISPUTE FROM NATIONAL JURISDICTION. WEISENFELD WAS OBLIGED TO INFORM THE GROUP THAT THESE LATEST OPIC PROPOSALS REGARDING ARBITRATION WERE REJECTED BY THE JUNTA IN LIMA.

6. AFTER THE TWO SESSIONS WITH THE WORKING GROUP, WEISENFELD AND THE E/C COUNSELOR MET WITH GALO MONTANO, MINISTER OF MICEI. MONTANO REAFFIRMED HIS STRONG DESIRE TO HAVE OPIC OPERATING IN ECUADOR AGAIN. E/C COUNSELOR OPINED THAT THIS IS NOT LIKELY TO HAPPEN UNLESS MONTANO PERSONALLY PRESSES THE FOREIGN MINISTRY TO SUBSTITUTE PRAGMATISM FOR ILL-FOUNDED LEGALISM. MONTANO SAID HE WOULD RAISE THE MATTER PROMPTLY WITH LIMITED OFFICIAL USE

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THE FOREIGN MINISTER AND WOULD STRESS THE IMPORTANCE TO ECUADOR OF HAVING OPIC INSURANCE AVAILABLE AGAIN TO U.S. INVESTORS. MONTANO MADE CLEAR, HOWEVER, THAT NO CHANGE COULD BE EXPECTED IN THE FOREIGN MINISTRY'S POSITION AGAINST ARBITRATION.

7. FINALLY, WEISENFELD MET WITH ANTONIO TERAN, DIRECTOR OF CENDES, WHO ALSO SAID HE WOULD PRESS FOR FAVORABLE GOE ACTION ON OPIC'S PROPOSALS.

8. EMBASSY COMMENT: THE HESITATIONS ON THE PART OF THE FOREIGN MINISTRY LAWYERS REGARDING CONSTRUCTION CONTRACTORS AND SUBROGATION SEEM ATTRIBUTABLE ONLY TO AN ADVERSION TO HAVING ECUADOR BE THE FIRST COUNTRY IN THE NEIGHBORHOOD TO DROP THE BARRIERS TO OPIC'S REENTRY. REGARDING THE ARBITRATION ISSUE, HOWEVER, THE OPPOSITION IS CLEARLY ATTRIBUTABLE TO A DEEP-FELT CONVICTION ON THE PART OF THE LAWYERS THAT THERE IS NO WAY TO RECONCILE ARBITRATION RIGHTS WITH ARTICLE 51 OF DECISION 24 AND WITH ECUADOREAN NATIONAL LAW. END SUMMARY.
CORR

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